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Supreme Court, U.S.
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In The Supreme Court Of The United States

October Term, 1994

CHARLES MEKKAM,

Petitioner,

v.

OREGON HEALTH SCIENCES UNIVERSITY and DOUGLAS McDONALD,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In an action under 42 U.S.C. § 1981 which pre-dated the 1991 Civil Rights Act, where the plaintiff pleaded and proffered evidence that he was denied a promotion based upon race, and no motion was made against the claim on grounds of evidentiary insufficiency, does this Court's decision in Rivers v. Roadway Express, Inc., ____ U.S. ___, 114 S.Ct. 1510, 128 L.Ed. 2d 274 (1994) affect the viability of the pre-act promotion claim?

2. Where a party has secured a judgment of a federal law claim against a state university is it a denial of due process and equal protection of law under the Fourteenth Amendment of the United States Constitution for the State's judicial branch to refuse to apply its own procedural rules and cause that judgment to be reversed on an issue not raised at trial?

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Petitioner Charles Mekkam ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision dated May 16, 1995 of the Oregon Supreme Court denying review of the decision of the Court of Appeals of the State of Oregon dated January 25, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Oregon was filed on February 23, 1994. That decision was vacated by the Oregon Supreme Court on August 25, 1994 in light of Rivers v. Roadway Express, Inc., _____ U.S. ____, 114 S.Ct. 1510, 128 L.Ed. 2d 274 (1994). The Oregon Court of Appeals filed its opinion on remand on January 25, 1995. The Opinion of the Oregon Court of appeals reversed the judgment against Oregon Health Sciences University and affirmed the judgment against the individual defendant. The Oregon Supreme Court denied review on May 16, 1995.

JURISDICTION

The Oregon Supreme Court denied Petitioner's petition for reconsideration on July 18, 1995 following its denial of Petitioner's petition for review, on May 16, 1995. Petitioner had sought review of the Oregon Court of Appeals' decision filed January 25, 1995, in which the judgment against Oregon Health Sciences University was reversed. The Appellate Judgment was entered August 8, 1995.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner proceeded under 42 U.S.C. § 1981, which provides in part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of

> persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The Fourteenth Amendment of the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SUMMARY OF THE CASE

Plaintiff, a black native of Nigeria, was employed at Oregon Health Sciences University ("OHSU") as an accountant clerk in 1986. His job was to review OHSU's telephone bills for accuracy, pay them and recoup the payments from the various OHSU departments. He also worked with those departments on billing problems. He was an outstanding employee. In 1987 he received a rating of "excellent" with notations referencing his outstanding work.

In 1990 after OHSU instituted a new computerized on-line telephone billing system, Plaintiff's job changed dramatically. OHSU began to purchase its own telephone equipment and he had to devise a way to recover the capital cost of that investment from customers. In addition, the goals of the organization changed and he had to become concerned not only with cost recovery, but also with making a profit. He also provided high-level administrative support to the organization. His job functions increased after the conversion. He began attending management meetings and made recommendations about problems and projections and functioned as liaison between OHSU and departments that were not located on the main campus in Portland.

Because he was doing work above his classification Plaintiff sought a reclassification of his position. At the time of the conversion he was classified an accounting technician, salary range 15. Because this classification was not an accurate reflection of his duties and responsibilities, he utilized a union mechanism to attempt to obtain a reclassification. However, because the system was

restricted so that to prevail he had to identify another job already in existence and his job was unique, that effort failed.

At the same time everyone in his department that was affected by the change in the organization was reclassified except Plaintiff. While others received management's support for a reclassification to non-existent job classifications, Plaintiff did not receive that support. While others had job titles created for them he did not receive the same treatment. An organization chart had been created and approved which showed that Plaintiff was to be made Tele-Database Administrator. But, instead of adding that new title to the new list of titles, as was done with others, Plaintiff was told that could not be done for him. His supervisor refused to create a new job description for him.

The position Plaintiff was seeking through his reclassification efforts would have been one which was significantly higher than his existing job title. The administrative specialist job was a higher-ranking position.

The difference in salary between his grade 15 job and the grade 20 telecommunications analyst job was $471.00 per month.

Plaintiff spoke with his supervisor, McDonald, about this situation on August 3, 1990, and again on September 4, 1990 after he discovered that an inventory clerk on a salary schedule 11 who had been doing data input and providing assistance to Plaintiff had actually passed him and was now being reclassified as a Tele-communications Analyst at salary schedule 20. Both had been listed as database administrators on the January 1990 organization chart. He received no relief.

In September 1990 Plaintiff filed a complaint with the affirmative action office at OHSU. Mr. Ray Ruiz, OHSU's Affirmative Action Officer, testified that Plaintiff's complaint had presented a prima facie case of race discrimination and Mr. Ruiz developed a pre-settlement agreement dated November 30, 1990. That document noted that McDonald had admitted that he knew of no comparable position to Plaintiff's at any other institution and that as of

November 28, 1990 still no job description existed for Ms. Fox, the person who was being promoted to telecommunications analyst. Mr. Ruiz wondered how Ms. Fox could obtain the upward reclassification when she still did inventory and phone location work and had no job description. Mr. Ruiz proposed a settlement that Plaintiff simply be given a position equivalent to that held by Ms. Fox. McDonald received the proposal on November 30. Mr. Ruiz asked McDonald for a response to his proposal by December 5, 1990.

On December 4, 1990, one day before he was to respond to Mr. Ruiz, McDonald issued a layoff notice to Plaintiff. It said "Due to the automation of the billing system, it is necessary to reduce the staff...you will be laid off effective the end of your shift on January 4, 1991." His layoff was later extended to February 8, 1991.

The subject of Plaintiff's removal had come up at previous management meetings at OHSU. It was suggested in those meetings that it might be very difficult to get rid of Plaintiff because of his race and that management would

probably have to eliminate the position and rewrite it, by taking his job description and closing it out and after he was gone rewriting it to bring in somebody to do his functions. A former manager at OHSU who was a witness to those meetings believed that Plaintiff's race was a consideration in how he was regarded.

At trial Defendants made only four motions for directed verdict: (1) that for purposes of all claims there was no discharge; (2) that McDonald should be dismissed from all claims, including the Section 1981 claim, because he was merely the alter ego of OHSU; (3) that the evidence in support of Plaintiff's claims for punitive damages was insufficient; (4) that the 1991 Civil Rights Act was not retroactive. Defendants did not move for directed verdict on the ground that Plaintiff failed to establish sufficient evidence to support his failure to promote claim or to otherwise challenge the failure to promote theory under Plaintiff's Section 1981 claim.

The Court of Appeals ignored that failure and went on to hold that "plaintiff's failure to promote theory was not

actionable under the 1988 version of Section 1981." Mekkam v. Oregon Health Sciences Univ., (Mekkam I), 126 Or.App. 484, 489, 869 P.2d 363 (1994). That portion of its opinion was adopted on remand. The Oregon Supreme Court, with one dissenter, denied review.

REASONS FOR GRANTING THE WRIT

Promotion claims under section 1981 were viable before the 1991 Civil Rights Act even under Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 2d 132 (1989), under certain circumstances. In this case there was evidence of a racially motivated promotion denial. No motion was made against that claim on grounds of evidentiary insufficiency. Yet the Oregon Court of Appeals ruled that the evidence was insufficient to qualify under Patterson because there was no evidence that Plaintiff "assumed supervisory duties." Mekkam I, supra, 126 Or.App. at 490. The Court of Appeals misapplied Patterson and never should have reached the question at all because Defendants failed to preserve error on that issue. It was a

denial of due process and equal protection for the Court to have reached this question.

A. THE COURT OF APPEALS ERRED IN CONSIDERING FOR THE FIRST TIME ON APPEAL DEFENDANTS' CHALLENGE TO THE EVIDENCE SUPPORTING PLAINTIFF'S FAILURE TO PROMOTE CLAIM IN PLAINTIFF'S SECTION 1981 ACTION.

1. Defendants' Motion For Directed Verdict Due To The Non-Retroactivity Of The Civil Rights Act Of 1991 Did Not Preserve A Challenge On The Grounds Of Evidentiary Insufficiency To The Failure To Promote Portion Of The Section 1981 Claim.

Defendants moved for directed verdict against the Section 1981 claim with respect to the inclusion of the individual defendant, with respect to the discharge claim within it, and because they claimed the 1991 Act was not retroactive, but they never moved against the failure to promote claim within the Section 1981 claim on grounds of evidentiary insufficiency. The only motion for directed verdict which addressed more than one aspect of the Section 1981 claim was on the specific ground that the 1991 Act

was not retroactive. Since a failure to promote claim was actionable before the enactment of the 1991 Act under some circumstances, Defendants never asked the Court to rule on the evidentiary sufficiency of the failure to promote aspect of Plaintiff's Section 1981 claim under the law which Defendants contended applied. When a party does not raise the issue in its motion for directed verdict, the appellate court should not consider it. Kabban v. Mackin, 104 Or.App. 422, 433, 801 P.2d 883 (1990); Vancil v. Poulson, 236 Or. 314, 320, 388 P.2d 444 (1964); NW Pacific Indemnity v. Southern Pacific, 296 Or. 365, 372 n. 1, 677 P.2d 671 (1984) ("A motion for a directed verdict is not the proper vehicle for asking the trial court to decide as a matter of law that the movant is entitled to prevail on less than all of the elements of a claim."); Remington v. Landolt, 273 Or. 297, 302, 541 P.2d 472 (1975) (grounds not stated at the time of motion will not be considered by appellate courts); Investors Equity Exchange, Inc. v. Whiteley, 269 Or. 309, 313-14, 524 P.2d 1211 (1974); ORAP 5.45. Defendants did not preserve a challenge on grounds of

evidentiary insufficiency to the failure to promote aspect of the Section 1981 claim, and did not allow the trial court the opportunity to rule on the issue below. Therefore, the Court of Appeals erred when it considered for the first time on appeal Defendants' challenge to the failure to promote claim on that ground.

Defendants did not claim at trial that there was insufficient evidence to support the failure to promote claim. They should not be allowed to prevail on appeal based upon that new argument. Vancil v. Poulson, supra, 236 Or. 320. Since the issue of insufficient evidence was not properly preserved, the Court of Appeals erred when it originally held: "In sum, plaintiff's failure to promote theory was not supported by evidence that would allow him to recover under 42 U.S.C. § 1981 (1988)." Mekkam I, supra, 126 Or. App. at 490.

2. Defendants Had The Burden To Move Against Plaintiff's Promotion Theory On The Basis Of Insufficient Evidence.

Under Patterson, denial of promotion claims were actionable under pre-1991 Act law under certain

circumstances. Patterson v. McLean Credit Union, supra, 491 U.S. 164; Sitgraves v. Allied-Signal, Inc., 953 F.2d 570, 574-75 (9th Cir. 1992).

Here there was evidence that Plaintiff was denied a promotion, and that it was therefore incumbent on Defendants to move against the promotion claim on the grounds of evidentiary insufficiency.

There was evidence that Plaintiff was denied a promotion because of his race. The jury could have found that OHSU should have promoted Plaintiff in 1990 because he had assumed new duties; the conversion had caused his job functions to increase; he was working above his classification without being paid for it; the work included providing high-level advice and administrative support to the organization; the change in job title would be to a "significantly higher" position, to a new job that previously had not existed at OHSU and which would have required the negotiation of a new job title through the collective bargaining process. The jury could have found that others received management's support for reclassification while he

did not. On occasion new job titles were created, or persons were reclassified to nonexistent job classifications, but Plaintiff was refused that favored treatment. The jury could have found that Plaintiff and other minorities were disfavored in the department.

Because no motion was made against the failure to promote claim on the grounds of evidentiary insufficiency, it was not proper for the Court of Appeals to reverse the trial court based upon insufficient evidence.

The Court of Appeals originally relied upon Sitgraves v. Allied-Signal, Inc., 953 F.2d 570, 573 (9th Cir. 1992), to hold such increase in pay and duties are typical of an ordinary promotion and failed to amount to an opportunity to form a new contractual relationship. Mekkam I, supra, 126 Or.App. 489-90. The court reasoned there is no evidence Plaintiff assumed supervisory duties. On remand the court simply adopted and incorporated its original analysis. Mekkam II, 132 Or.App. 470, 473, 888 P.2d 1093 (1995).

There are three problems with the Court of Appeals' analysis. First, in Sitgraves the Ninth Circuit did not establish an exclusive list of factors; rather, it rules one set of factors present in the case satisfied the new contractual relationship standard imposed in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989), and that another set of factors did not. See Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 802 (10th Cir. 1993) (the situations in Sitgraves are not definitive, but rather illustrative of criteria to be employed in the qualitative change analysis). In Sitgraves the Ninth Circuit held one set of employees did not have an actionable claim when the promotion they sought was simply to a more skilled position with higher pay, because essential terms of the contractual relationship would not have been affected. Sitgraves, supra, at 574. However, the holding did not establish what factors must be altered to satisfy the Patterson standard. See Rodriguez v. General Motors Corp., 27 F.3d 396, 400 (9th Cir. 1994); Cf. Mallory v. Booth Refrigeration Supply Co., Inc., 882 F.2d 908, 910 (4th Cir.

1989). The Court of Appeals' implication that an assumption of supervisory duties would be necessary under Sitgraves is simply too restrictive a reading.

Here, in addition to the increased duties and pay, the reclassification was sought because Plaintiff was giving high-level advice and administrative support. In addition, there was evidence the change in job title represented a "significantly higher" position; to a new job title that previously had not existed at OHSU; and, would have necessitated the negotiation of a new title and pay through the collective bargaining process. The reasoning in Sitgraves supports a finding that the combination of the factors present here amount to a position involving a new contractual relationship. At the very least a jury question was presented on that issue, and Defendants did not request a jury instruction which called upon the jury to consider any of the Patterson factors.

Second, the Court of Appeals' analysis failed to recognize the importance and account for the requirement that a new job title had previously not existed at OHSU; that

the job was unique and without comparators; and, that the creation of the new classification and salary range would have normally involved negotiations with the union as part of the collective bargaining process. If OHSU had followed that process of reclassification through union negotiation the promotion would have required an amendment to the collective bargaining agreement and therefore a new contractual relationship.

Finally, the Court of Appeals ignored Plaintiff's objection that Defendant was raising the issue of the evidentiary insufficiency of the failure to promote claim for the first time on appeal. Because Defendants never made a motion on the "basis of evidentiary insufficiency against the failure to promote claim under the law it contended applied, the Court of Appeals never should have considered the sufficiency of the evidence on that issue.

3. As The Trial Court Denied Defendants' Motion For Directed Verdict On The Section 1981 Claim Its Ruling On That Motion Should Be Upheld If It Was Right, Even If Not For That Reason.

The trial court noted that the motion for directed

verdict was made "on the specific ground that the 1991 Civil Rights Act should not be applied retroactively." It denied the motion on that specific ground. Its ruling on that motion should be upheld if it was right, even if not for that reason. Zollinger v. Warner, 286 Or. 19, 24, 539 P.2d 1107 (1979); Artman v. Ray, 263 Or. 529, 532-34, 501 P.2d 63, opinion clarified, 263 Or. 534, 502 P.2d 1376 (1972). The trial court was right in denying the motion because the grounds stated for the motion to dismiss the entire claim were inadequate. The only relevant ground that was asserted was that the 1991 Act was not retroactive. Even if it were so that the 1991 Act was not retroactive, that ground would not address that portion of the claim relative to the promotion claim under pre-1991 Act law. The only way to address the promotion claim under pre-1991 Act law was to make a motion for directed verdict on grounds of evidentiary insufficiency. That motion was not made. Since the motion was not made the trial court was correct in denying the motion on the specific ground asserted. The trial court's ruling on that issue should be upheld. The

Oregon appellate courts should be reversed on that issue.

B. IT WAS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW FOR THE OREGON APPELLATE COURTS TO IGNORE THAT STATE'S PROCEDURAL RULES TO INVALIDATE A JUDGMENT AGAINST A COORDINATE STATE AGENCY.

Plaintiff was entitled to due process and equal protection of the laws. When the Oregon Appellate Court failed to follow their own procedure rules in favor of a coordinate state agency they violated his Federal Constitutional rights in that respect.

The federal guaranty of due process extends to state action through its judicial as well as through its other branches of government. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 1107 (1930). Even though states may not be required to create an appellate system, once created any appellate system must comply with the principles of due process. Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 838-39, 83 L.Ed. 2d 821 (1985).

Here, Petitioner had a property right to the judgment

obtained in the trial court, which once obtained he could not be deprived without due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-31, 102 S.Ct. 1148, 1154-55, 71 L.Ed. 2d 265 (1982) (an administrative claim of discrimination has sufficient value to be labeled proeprty).

This Court has held that a state court cannot reconfigure its remedial scheme in mid-course where the reconfiguration denies an individual a previously established remedy. Reich v. Collins, 513 U.S. ____, 115 S.Ct. 547, 550, 130 L.Ed. 2d 454, 459-60 (1994) (regarding invalid tax collections, although due process allows a state to maintain a remedial tax scheme that is exclusively pre-depravation, exclusively post-deprivation, or a hybrid, and to reconfigure its scheme over time to fit changing needs, it may not do what the Georgia court did, that is bait and switch in mid-course). Likewise, this Court has held that an asserted local appellate procedural rule could not be used to defeat this court's jurisdiction where the application of the rule could not be reconciled with the state court's unambiguous previous rulings that did not require following

the procedural rule asserted. NAACP v. Alabama ex.rel. Patterson, 357 U.S. 449, 454-57, 78 S.Ct. 1163, 1168-69, 2 L.Ed. 2d 1488 (1958).

The analogous principle, that a state court cannot ignore a previously established procedural rule in order to deny an individual rights to a judgment, applies to this case. Here, the requirement of preservation of error is unambiguously established in Oregon Rules of Appellate Procedure, ORAP 5.45, and the case law cited above in section A.1. See, e.g. Kabban, supra, Vancil, supra, Remington, supra. However, the Oregon Court of Appeals ignored this requirement of appellate procedure to reverse the trial court on Petitioner's Section 1981 claim. In so doing the court switched its remedial scheme in mid-course and deprived Petitioner of due process. See NAACP, supra, 357 U.S. at 454-57; Reich, supra, 130 L.Ed. 2d at 459.

The additional factor present here, that Defendant OHSU is a state agency, raises an equal protection issue. Since the established rule was ignored where the Defendant was a coordinate state agency, Petitioner as a public employee/plaintiff was denied equal protection of the laws. See Logan, supra 455 U.S. at 438-40, 102 S.Ct. at 1159-60 (Blackmun, J., concurring) (statutory creation of two classes of discrimination claims raises an equal protection issue).

CONCLUSION

Respondent failed to make a motion against Plaintiff's promotion claim on evidentiary grounds, and the Oregon Court of Appeals should not have supplied that missing motion. In so doing, Petitioner's due process and equal protection rights were violated. In any event, the Oregon Court of Appeals misapplied Patterson v. McLean Credit Union.

For these reasons, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Oregon Court of Appeals.

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